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In The

Supreme Court of the United States

October Term, 1974

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF RESTON, VIRGINIA HOMEOWNERS,

Petitioners,

v.

VIRGINIA STATE BAR AND FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

MOTION TO DISMISS ON BEHALF OF THE VIRGINIA STATE BAR

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1. **Whether The Action Of The Virginia State Bar, An Administrative Agency Of The Supreme Court Of Virginia, In Distributing Minimum Fee Reports And In Issuing Opinions With Respect To Ethical Conduct Of Attorneys, Constitutes "State Action" Exempt From Federal Antitrust Laws?**

2. **Whether The Virginia State Bar, An Administrative Arm Of The Virginia Supreme Court, Is Immune From Suit On Account Of The Eleventh Amendment Of The United States Constitution?**

STATEMENT OF THE CASE

Respondent, Virginia State Bar, agrees substantially with the statement of the case by the Goldfarbs. To the extent that it disagrees, *e.g.*, with respect to their comparison of the minimum fee reports of the State Bar with the minimum fee schedule of the Fairfax County Bar Association, these matters will be addressed in argument.

Additionally, the following facts are pertinent to a consideration of the nature of the Virginia State Bar, although they are inclusive of some previously stated by petitioners.

The State Bar is an administrative agency of the Supreme Court of Virginia created by the Supreme Court of Virginia pursuant to the laws of Virginia, including § 54-49, Code of Virginia (1950), as amended. The Supreme Court of Virginia has promulgated rules and regulations governing the conduct of attorneys and the operations of the State Bar which are found in §§ II and IV of Part VI of the Rules of the Supreme Court. (Stip. 9; App. A, p. 17[1]).

The powers of the State Bar have been delegated to the council of the State Bar, which is comprised of one or more[2] persons from each judical circuit in Virginia, six persons appointed at large by the Supreme Court of Virginia, and the president, president-elect and immediate past president, all of whom serve as *ex officio* members. (Stip. 10; App. A, pp. 17-18).

Each attorney practicing law in Virginia is required by statute and by court rule to be a member of the State Bar. The State Bar is required by statute and rule to investigate alleged violations of the standards of conduct mandated by the Supreme Court Rules, and to report its findings to a

[1] Since petitioners have set out the stipulations in their brief, respondent will reference that appendix, rather than the record below.

[2] Since the institution of this action, there has been a minor amendment of the Rules.

court of appropriate jurisdiction for further disciplinary proceedings. (Stip. 11; App. A, p. 18).

The Supreme Court has delegated to the State Bar responsibility for investigating complaints of unprofessional conduct of any member of the State Bar. Such investigations are carried out by district committees which are comprised of attorneys. There is such a committee organized in each of the ten congressional districts of Virginia. (Stip. 22; App. A, p. 20).

Pursuant to § 54-52 of the Code, the funds for operation of the State Bar are appropriated from a special fund of the State Treasury by act of the General Assembly. The special fund in the State Treasury consists of fees paid by members of the State Bar, the amounts of which are set, pursuant to statute, by the Supreme Court. (Stip. 12; App. A, p. 18).

The State Bar has been given authority by the Supreme Court of Virginia to issue opinions on matters involving questions of ethics. (Stip. 16; App. A, p. 19). The Supreme Court of Virginia has stated that suggested fee schedules and economic reports of the State Bar and of local bar associations involve questions of ethics. (Stip. 18; App. A, p. 19). The State Bar has been given authority by the Supreme Court of Virginia to issue opinions on questions of ethics, such as Opinions 98 and 170 which relate to minimum fee schedules, and to disseminate minimum fee schedule reports. (Stip. 19; App. A, p. 19).

In 1962 and 1969, attorneys who were members of the State Bar prepared on behalf of the State Bar minimum fee schedule reports. (Stip. 14; App. A, p. 18). Minimum fee schedules of some type are published and circulated in at least thirty-four states and in the District of Columbia either by the voluntary bar or by a counterpart of the State Bar. (Stip. 26; App. A, p. 20).

The State Bar has never received a communication from the respondent local bar association regarding the professional conduct of any member of said association or any member of the State Bar, including failure of such members to follow a minimum fee schedule. (Stip. 24; App. A, p. 20). The State Bar has never received a communication from any person regarding the professional conduct of any member of the State Bar with respect to minimum fee schedules. (Joint Appendix, p. 113). The State Bar has never initiated or participated in any administrative or judicial action against an attorney for failure to adhere to a minimum fee schedule. (Stip. 25; App. A, p. 20).

Virginia attorneys who provided legal services to prospective home buyers in Reston, Virginia, are specifically prohibited by the Code of Professional Responsibility promulgated by the Supreme Court of Virginia from advertising their services or their charges for these services either within or without the State of Virginia. (Stip. 23; App. A, p. 20).

ARGUMENT

A.

State Action

The seminal case with respect to "state action" is *Parker* v. *Brown,* 317 U.S. 341 (1943). The case involved an interpretation of the applicability of the Sherman Act to the actions of a State agency. The following language is instructive:

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from

> activities directed by its legislature." 317 U.S. at 350-351.
>
> * * *
>
> "There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations.' " 317 U.S. at 351.
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> * * *
>
> "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." (Citation omitted.) 317 U.S. at 352.

As far back as 1895, it was ruled that a state was not a "person" who could violate the Sherman Act. *Lowenstein* v. *Evans,* 69 F. 908 (C.C.D.S.C. 1895). This Court subsequent to *Parker* had another opportunity to consider the "state action" exemption to the Sherman Act in *Eastern Railroad President's Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), which held that efforts to restrain trade by obtaining passage of laws was "state action" within the meaning of *Parker*. Therein the Court stated:

> ". . . the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of 'individuals or combinations of individuals or corporations.' Accordingly, it has been held that where restraint upon trade or monopolization is a result of valid governmental action, as opposed to private action, no violation of the Act can be made out." 365 U.S. at 135-136.

The common thread weaving its way through *Parker* and *Noerr* is that the State cannot be held responsible for a violation of the Sherman Act.

The Court of Appeals applied to the State Bar those guidelines set out in *Parker* to determine whether antitrust immunity has been conferred upon private persons. (497 F.2d 1, 6-12; Pet. Brief, App. B, pp. 6-12). Based upon such analysis, the Court found that the State Bar was exempt. (497 F.2d at 12; Pet. Brief, App. B, p. 12). While the decision was correct, it was not necessary for the Court to undertake such an approach. Since the State Bar is a state agency, the Court should simply have concluded that it was not capable of violating the Sherman Act for the reasons previously stated.

As to this proposition, there is no conflict among the circuits. Petitioners cite two cases for the proposition that governmental officials are not necessarily immune. (Brief, p. 28). Neither, however, are dispositive of the instant case. Both *Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), and *Norman's on the Waterfront, Inc.* v. *Wheatley*, 444 F.2d 1011 (3rd 1971), involved situations where the courts found that no antitrust immunity had been conferred upon private parties. Neither involved findings that the governmental defendants were liable for violation of the Sherman Act, the relief sought here. There is simply no conflict among the federal courts as to the issue that injunctive relief and damages will not issue against a state agency under the Sherman Act.

Moreover, the role of the State Bar has been an extremely minor one in any event. While it published fee reports, this is clearly a very incidental part of the action complained of in that they are not binding, but are mere guidelines for

localities and in fact, were not adopted in their entirety by the Fairfax County Bar Association, even as to the title examination fees.[3] It is further significant that in rendering the opinions complained of and in publishing the minimum fee reports, the State Bar is carrying out its statutory responsibility; it is not acting in a commercial or proprietary capacity.

B.

Sovereign Immunity

The Eleventh Amendment to the Constitution of the United States reads as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens who are subjects of any foreign state." *U.S. Const. amend. XI*

In *Hans* v. *State of Louisiana*, 134 U.S. 1 (1890), it was held that in the absence of waiver, actions against a state by a fellow citizen were prohibited as well as actions by citizens of different states. An early exception to this rule was created in *Ex Parte Young*, 209 U.S. 123 (1907),

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[3] A comparison of page 11 of the Virginia State Bar minimum fee schedule report of 1969 (Exh. 27; J.A. 70) with page 25 of the Fairfax Bar Association minimum fee schedule of 1969 (Exh. 29; J.A. 84) reveals (a) that there is a minimum title examination fee of $100 under the Fairfax schedule while there is a minimum fee for title examination of $75 under the State Bar report, (b) the Fairfax schedule provides for a fee of one-half of one percent of the amount of loan or purchase price, whichever is greater, from $50,000 to $100,000 and one quarter of one percent of the loan amount or purchase price, whichever is greater, from $100,000 to $1,000,000, while the State Bar report provides for a fee of one-half of one percent of the loan amount of purchase price from $50,000 to $250,000 with any amount over $250,000 of loan amount or purchase price to be reached by negotiation or agreement.

wherein the Court held that immunity did not extend to action being taken pursuant to an unconstitutional statute or action taken outside of the authoriy of the governmental agent in question, which exception is generally known as the *ultra vires* exception. There is no allegation that the Virginia State Bar was acting pursuant to an unconstitutional statute, nor that it exceeded its authority.

Additionally, a state may waive its sovereign immunity, *see e.g. Parden* v. *Terminal Railway of Alabama State Docks Department,* 377 U.S. 184 (1964). This Court has made clear, however, in two recent cases that any such waiver intended by Congress must be explicit. It will not be presumed to have acted silently. See *Employees of Department of Public Health and Welfare* v. *Missouri,* 411 U.S. 279 (1973) and *Edelman* v. *Jordan,* 94 S.Ct. 1347 (1974). Congress has not only failed to indicate that a state shall be deemed to have waived its sovereign immunity for purposes of the Sherman Act; but, as previously stated, as far back as 1895, it was ruled that a state was not a "person" within the meaning of the Sherman Act.

Since the State Bar is a state agency and since any judgment would have to be paid from the State Treasury, it is manifest that the State Bar enjoys sovereign immunity in this action.

CONCLUSION

If minimum fee schedules are found to violate the Sherman Act, there would be no necessity for enjoining the State Bar from utilizing them in a determination as to whether unprofessional conduct has occurred. Further, no damages could be assessed against the State Bar. If the Court of Appeals was correct, certiorari should be denied.

In either event the State Bar should properly be dismissed as a defendant and a writ of certiorari as to it should be denied.

Respectfully submitted,

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